In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This supplemental brief is filed in response to the brief filed by the employer, Heck's, Inc., which argues that the Board has no authority to award litigation and organizational expenses.[1] That issue

[1] The same contention is made in the petition for certiorari before judgment in the court of appeals in *Tiidee Products, Inc.* v. *National Labor Relations Board*, No. 73-1180.

was not raised before or decided by the court of appeals, and neither the Board nor the Union has raised it in this Court.

We submit that (1) this issue is not properly before the Court and (2) that, in any event, the Board has authority to award litigation and organizational expenses.

I.

Although Heck's was the charging party before the Board, it did not participate in the court of appeals proceeding. The Board and the Union, who were the only parties conducting the litigation there, assumed that the Board has power to award litigation and organizational expenses, and merely litigated the propriety of the Board's refusal to exercise that power in this case.

After the court of appeals rendered its decision directing the Board to grant that relief, Heck's sought to intervene in that court in order to raise the issue of Board power. The court of appeals denied intervention. Heck's then filed a petition for certiorari challenging the denial of intervention, and also arguing that the Board had no power to award attorney's fees and organizational expenses. *Heck's, Inc.* v. *Food Store Employees Union, Local 347, etc.*, No. 73-559. Alternatively, Heck's moved to intervene in the present case (No. 73-370), which was pending on the Board's petition for certiorari. On December 3, 1973, the Court denied Heck's petition in No. 73-559, granted the Board's petition in No. 73-370, and denied Heck's motion to intervene in that case.

On January 25, 1974, however, the court of appeals on Heck's motion reconsidered its prior denial and granted Heck's intervention. Heck's then sought reconsideration of this Court's denial of Heck's petition in No. 73-559. The Court denied that request on March 4, 1974. Heck's then filed its brief in the present case, which seeks to raise the same issue the Court twice has declined to consider.

The theory upon which Heck's seeks to file its brief is unclear. Although it has amended the caption of the case to list itself as a respondent, on page 2 of the brief it "requests that it be made a party before this Court" "by virtue of its interest in these proceedings." The latter request is a mere renewal of its motion to intervene, which this Court denied on December 3, 1973. There is no greater reason to grant intervention now, on the eve of oral argument, than there was three months ago.

The inclusion of Heck's as a respondent in the caption suggests that the company now considers itself as a party as a result of the court of appeals' grant of intervention on January 25, 1974, more than six weeks after this Court granted the petition for certiorari. It is dubious, however, whether the court of appeals then had authority to take such action. The basic theory of a writ of certiorari is that it removes a case to this Court. See the model writ of certiorari reprinted in 1 West's Federal Forms, Supreme Court § 292. Once the petition has been granted, it is difficult to see the basis upon which the

court of appeals may add an additional party to the case.

In any event, if Heck's were deemed now to be a party respondent, the question it seeks to litigate would not be properly before the Court. The question is not set forth or fairly comprised in the petition for certiorari which the Board filed (Rule 23(c) of the Rules of this Court), which raised only the issue of the propriety of the modifications of the Board's order made by the court of appeals. Heck's is not seeking to affirm the judgment of the court of appeals on an alternative ground, but to reverse it on a different ground than that presented by the petitioner. In these circumstances, the Court could properly consider the issue only upon the grant of a timely petition for certiorari raising the point. See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431-432; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. As noted, however, the Court denied Heck's petition on this issue and denied rehearing.

If Heck's filing were to be considered as a motion for leave to participate as *amicus curiae*, it should be denied because it seeks to litigate an issue not presented in the petition or to the court of appeals.

Heck's argues (Br. 4), however, that a determination of the Board's authority to award attorney's fees and organization expenses is a prerequisite to deciding the issues upon which the Court granted certiorari, namely, whether the court of appeals improperly reversed the Board's refusal to grant such re-

lief and directed the agency to do so. This Court, however, has decided issues presented by the parties without reaching underlying issues that the parties did not raise. A striking example involves the question whether a private treble damage suit could be maintained for violation of Section 3 of the Robinson-Patman Act. In *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, the Court upheld a district court judgment awarding damages for violation of that section in a private antitrust suit. Three years later, when the question whether Section 3 was one of the "antitrust laws," for violation of which a private action could be maintained, was presented to the Court, it held in *Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 373, that the action would not lie. Cf. also *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 363-364.

II.

A. Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the policies of [the] Act." "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 539. Of course, the Act does not empower the Board "to devise punitive measures" or "to prescribe

penalties or fines which the Board may think would effectuate the policies of the Act"; the "affirmative action to 'effectuate the policies of the Act' is action to achieve the remedial objectives which the Act sets forth." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 11-12. But the "debate about what is 'remedial' and what is 'punitive' " entails entry "into the bog of logomachy"; it is "more profitable to stick closely to the direction of the Act by considering what order does * * *, and what order does not, bear appropriate relation to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348.

B. Interpreted in the light of these principles, Section 10(c) of the Act empowers the Board to require an employer who has committed unfair labor practices to reimburse the union and the Board for litigation expenses, and the union for the organizational expenses, which they may have incurred as a result of those union labor practices. Contrary to Heck's contention, such relief is neither the assessment of "damages" nor the infliction of "penalties." To award the union its litigation and organizational expenses attributable to the employer's unfair labor practices is "proximately related to securing the statutory rights of employees" (Heck's Br., p. 18, n. 27). Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing. Such an award helps assure the employees that the union which they have chosen as their representative will have the same re-

sources to represent their interests as it would have absent the employer's unfair labor practices. Thus, "it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Virginia Electric & Power Co., supra*, 319 U.S. at 543.[2]

Republic Steel Corp. v. *National Labor Relations Board*, 311 U.S. 7, upon which Heck's relies (Br. 13, 19), does not support its conclusion. There the Court disapproved a Board order requiring the employer to reimburse certain government agencies for work relief payments made to employees who were unemployed because of the employer's unfair labor practices. The Court found that the Board's order was "not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in re-

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[2] Similarly, where the employer's defenses to the unfair labor practices charged are frivolous, to require the employer to reimburse the Board for its litigation expenses serves to effectuate the policies of the Act. That restores to the government the monetary resources which it has expended in remedying those unfair labor practices, and tends to deter frivolous future litigation. This deterrence, in turn, makes more secure the future experience of organizational and collective bargaining rights by the employees immediately involved, and better enables the Board to vindicate the rights of employees in the other unfair labor practice cases which are continually being added to the Board's docket.

lation to the latter. That is not the function of the Board." *Id.* at 13. Here, on the other hand, the considerations which underlie an award of litigation and organizational expenses are, as shown above, directly related to effectuating the purposes of the Act.[3]

Respectfully submitted.

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[3] In *Hall* v. *Cole*, 412 U.S. 1, 5, the Court stated that the rationale of the federal courts for taxing frivolous violators with attorneys' fees is "punitive." It does not follow that the same considerations motivate a Board award of such fees. For, as shown above and in our main brief (pp. 23-25), the Board's decision rests on its judgment of how best to effecuate the purposes of the Act.

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